

K5SKACTC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 ACTAVA TV, INC., et al.,

4 Plaintiffs,

5 v.

18 CV 6626 (ALC) (KNF)  
Telephone Conference

6 JOINT STOCK COMPANY "CHANNEL  
7 ONE RUSSIA WORLDWIDE," et al.,

8 Defendants.

-----x

9 New York, N.Y.  
10 May 28, 2020  
10:35 a.m.

11 Before:

12 HON. KEVIN N. FOX,

13 Magistrate Judge

14 APPEARANCES

15 FRANKFURT KURNIT KLEIN & SELZ PC  
Attorneys for Plaintiffs

16 BY: TOBY M.J. BUTTERFIELD  
-and-

17 MOSES & SINGER LLP

18 BY: VALERIE M. CASTANARO  
MICHAEL M. ROSENBERG

19 DUNNINGTON BARTHOLOW & MILLER LLP  
Attorneys for Defendants

20 BY: RAYMOND J. DOWD  
21 AKBAR AZAM KHAN  
22 HARDIN P. ROWLEY  
23  
24  
25

K5SKACTC

(The Court and all parties appearing telephonically)

(Case called)

THE COURT: Counsel to the plaintiffs, please note your appearance.

MR. BUTTERFIELD: Good morning, your Honor. This is Toby Butterfield, of Moses & Singer. Your Honor, with your permission, I will probably defer on the substance of the applications today to my colleague, Michael Rosenberg, who I understand is on the line along with other -- my other colleagues.

MR. ROSENBERG: Yes, your Honor. Michael Rosenberg, also for the plaintiffs, also of Moses & Singer LLP.

THE COURT: Good morning to both of you.

MS. CASTANARO: And Valeria Castanaro, also for the plaintiffs. Good morning, your Honor.

THE COURT: Good morning.

Counsel for defendants, please note your appearance.

MR. DOWD: Good morning, your Honor. This is Raymond Dowd, of the Dunnington firm. And with me today -- and, similarly, we'd ask the Court's permission to divide the argument -- are Hardin Rowley and Akbar Khan. I'll ask them to introduce themselves.

MR. ROWLEY: This is Hardin Rowley, from Dunnington. Good morning, your Honor.

THE COURT: Good morning.

K5SKACTC

1 MR. KHAN: Good morning. This is Akbar Khan.

2 THE COURT: Good morning.

3 I want to begin with the writing that appears at  
4 docket entry No. 163. With respect to that writing, the  
5 plaintiffs contend that the nondisclosure agreement, the NDA,  
6 cannot be disclosed without Matvil's consent, which Matvil has  
7 withheld.

8 Have the defendants sought to subpoena the NDA from  
9 Matvil?

10 MR. DOWD: No, your Honor, we have not.

11 THE COURT: Is there a reason why you haven't done  
12 that?

13 MR. DOWD: Well, there's case law that says plaintiffs  
14 have effective control over the document, that they can produce  
15 it themselves. They're in a business relationship with them  
16 that's ongoing that's evidenced by a U.S. trademark filing, and  
17 they refused to even tell us what's in the NDA. We don't know  
18 what's in it. And it would be a great expense for our client  
19 to file letters rogatory in Canada to get this information.  
20 And we only learned about the existence of the NDA about three  
21 weeks ago in a footnote of a letter from 2018. So they've  
22 withheld this information from us. We could have done this  
23 earlier, but we learned about it, and we only recently had  
24 discovery extended two months, and based on plaintiffs'  
25 letters, rogatory experience, which has taken about a year, I

K5SKACTC

1 don't think it's in anyone's interests to delay the proceedings  
2 another year to go through Canadian courts again.

3 THE COURT: But if you're aware from the plaintiffs  
4 that there is a bar to disclosure without consent from Matvil,  
5 which you now know Matvil is not giving, if you are desirous of  
6 the document, it seems incumbent upon you to make efforts to  
7 get it that you haven't made by a subpoena, even though you may  
8 have to pursue foreign channels to get the document.

9 MR. DOWD: Well, we asked plaintiffs for a copy of  
10 their communications with Matvil when Matvil denied this, and  
11 we haven't received that either. So we don't really know if  
12 what plaintiffs are telling us is accurate.

13 THE COURT: Well, I think that if you want the  
14 document, you should pursue it from Matvil because it's  
15 unlikely that the plaintiffs are going to breach their  
16 agreement with Matvil. And this is a way, perhaps, to have  
17 Matvil, perhaps, reassess its position. Maybe you can contact  
18 Matvil short of a subpoena, and Matvil may not want to expend  
19 resources to litigate over a subpoenaed document and might  
20 reassess its view on whether it would agree to have the  
21 plaintiffs surrender the document to you.

22 MR. DOWD: We can reach out to Matvil, your Honor. We  
23 can do that.

24 THE COURT: All right.

25 In that same writing, appearing at docket entry

K5SKACTC

1 No. 163, the plaintiffs contend that the defendants did not  
2 meet and confer regarding the plaintiffs' performance under the  
3 referral agreement with Matvil or the defendants' contention  
4 that the plaintiffs' responses to document requests that  
5 pertained to the plaintiffs' claimed \$30 million projected  
6 losses are deficient. Parties must meet and confer on issues,  
7 such as these, before presenting them to the Court.

8 So, the only reference to meet and confer in the  
9 document appearing at docket entry 163 pertains to a  
10 meet-and-confer on another topic back in April 2019. So the  
11 parties are going to have to meet and confer on these contested  
12 issues unless there's some evidence that there has been a  
13 meet-and-confer on these two matters.

14 MR. DOWD: Your Honor, we did meet and confer, and I  
15 have a letter from April 5th, 2019, from Mr. Butterfield  
16 talking about that anticipated meet-and-confer, which we did  
17 have around April 11th.

18 A lot of the issues that we met and conferred with  
19 plaintiff -- most of their responses are not really objections.  
20 They said they would produce documents, and we waited patiently  
21 until December of 2019, when they told us they were completed.  
22 That's when we realized they weren't producing documents  
23 related to damages, discovery, and just generally in support of  
24 their claims, and that's why we filed this application.

25 So, we did meet and confer with them.

K5SKACTC

1 THE COURT: I'm sorry, I didn't hear clearly  
2 everything that you said. Would you mind repeating it, please?

3 MR. DOWD: Sure.

4 On April 5th, 2019, we have a letter, and we can  
5 provide it to you, from Mr. Butterfield discussing this  
6 meet-and-confer, which we had around April 11th, 2019. And  
7 when we met during that meet-and-confer, we focused on,  
8 obviously, their objections, plaintiffs' objections. The  
9 majority of their responses said they would produce responsive  
10 documents. What happened was we waited, and we expected them  
11 to come on a rolling basis, and then in December of 2019, they  
12 said they were finished. That's why we made inquiries if they  
13 were completed, and they said yes, and that's why we filed this  
14 application, which is seeking documents related to their  
15 damages and to our damages, because we've alleged breach of  
16 contract, and a lot of these documents would go to our damages  
17 against plaintiffs, and they haven't produced them. A lot of  
18 these are basic things about communications with Matvil, which  
19 they have not produced either and that certainly help support  
20 the case, and we're just trying to find that out. So we did  
21 meet and confer.

22 THE COURT: I want to be clear: The meet-and-confer  
23 back in April 2019 was specific to the performance on the  
24 referral agreement and the \$30 million that are referenced in,  
25 I think it is, paragraph 82 of the amended complaint; that's

K5SKACTC

1 defendants' position?

2 MR. DOWD: Yes, your Honor.

3 THE COURT: All right. Let me turn to plaintiffs'  
4 counsel.

5 Do you recall, back in April 2019, a specific  
6 meet-and-confer exchange with defendants on the issue of  
7 performance under the referral agreement and the projected  
8 losses?

9 MR. ROSENBERG: Your Honor, we do recall that the  
10 issue --

11 THE COURT: Would you identify yourself for the  
12 reporter, please.

13 MR. ROSENBERG: Yes, your Honor. Michael Rosenberg,  
14 for the plaintiffs.

15 Your Honor, we did not have a meet-and-confer  
16 specifically covering what's in the application today. I  
17 believe that in passing, the issue arose, and we represented  
18 that we would be producing documents on an ongoing basis, which  
19 is what we have continued to do. We have indicated that we  
20 will produce all documents by seven days prior to the  
21 depositions in this case, which will occur sometime in June.  
22 Contrary to the representation just made, we never stated that  
23 by December of last year, the productions had already been  
24 complete. But our position is that we have produced documents  
25 reflecting the performance of the referral agreements, and the

K5SKACTC

1 same goes for documents relating to our damages.

2 We haven't certified, yet, that our productions are  
3 complete, however, and that goes for all the parties in this  
4 case. We do not recall a meet-and-confer specifically about  
5 the issues raised in this application, and that's part of the  
6 problem with the motion practice in this case, is that it's  
7 hard to keep track of what applications refer to a certain  
8 meet-and-confer. However, we're willing to diligently work  
9 with the defendants in good faith to produce what they believe  
10 is deficient. And, again, by the application today, it's still  
11 unclear to us exactly what they believe we have not produced.

12 THE COURT: Defense counsel, do you want to be heard  
13 further?

14 MR. DOWD: I would ask --

15 MR. BUTTERFIELD: Toby Butterfield.

16 May I supplement with one other point, your Honor?  
17 This is Toby Butterfield.

18 THE COURT: Go ahead, Mr. Butterfield.

19 MR. BUTTERFIELD: This is the problem: The defendants  
20 are relying on a meet-and-confer conference back in April 2019,  
21 before many, many document productions were made by the  
22 defendants. And they came to this Court on this application  
23 seeking, without having raised the issue again, for a motion to  
24 compel about 65 different undifferentiated requests. The list  
25 of the categories is very lengthy.



K5SKACTC

1           And the problem, I think, as I see it, is that they  
2           should have identified which documents they are saying we  
3           haven't produced rather than just coming to this Court and  
4           saying every single one of these is deficient, because we  
5           produced a lot of documents since then.

6           THE COURT:   How would the defendants be able to  
7           identify for you what you haven't produced unless the  
8           defendants are privy to all of the documents in your possession  
9           and under your control?

10          MR. BUTTERFIELD:   Well, I think the issue may be, in  
11          part, the question of which documents respond to which request.  
12          And, as required, we've identified for them which documents  
13          respond primarily to which response.   But this is all a bit  
14          moot, your Honor, and premature because we're in the middle of  
15          preparing damages reports from experts, who will presumably be  
16          deposed, and those are going to identify the basis for the  
17          damages contentions and the support for them.

18          So, there are also damages documents which we're  
19          seeking from Matvil pursuant to the letters rogatory.   So, our  
20          position is really this application is, we think, misguided and  
21          not really the most efficient way to get to the issue that  
22          Mr. Dowd wants to try and nail down as to all the different  
23          categories of requests to which every single document in our  
24          document production responds to.

25          THE COURT:   When is it that the damages calculation

K5SKACTC

1 and expert submission to you is going to be provided to your  
2 adversaries?

3 MR. BUTTERFIELD: Well, it depends a little bit on  
4 what happens in the Canadian proceeding, as we explained to  
5 your Honor in a recent letter requesting a slight extension of  
6 the time for remaining discovery. But we are contemplating  
7 that we will finalize our expert's report in late June or early  
8 July.

9 THE COURT: So the defendants should just wait until  
10 then because you cannot give any information about the  
11 allegation in the complaint that projects \$30 million of losses  
12 until July?

13 MR. BUTTERFIELD: No, your Honor. We think we've  
14 given lots of documents that relate to that, and they're all  
15 within our document production. Mr. Dowd's complaint seems to  
16 be that he isn't -- he wants us to sort of -- it's sort of like  
17 without having served contention interrogatories, in which he  
18 would request us to identify which document -- all the  
19 different categories to which every single document we have  
20 produced relates, he wants the Court to order production of  
21 documents, many of which, and not all of which, we have already  
22 produced.

23 THE COURT: I'm not altogether certain I'm  
24 understanding what you're saying. There's an allegation in the  
25 complaint that there are projected losses of \$30 million. If

K5SKACTC

1 there is a request for information about that allegation, is it  
2 the plaintiffs' position that the defendants should wait until  
3 the expert prepares something about all damages or that the  
4 plaintiffs have provided information key to that allegation in  
5 the complaint -- I think the paragraph is 82, I could be wrong  
6 about that -- and if it's the latter, can you identify which  
7 document or documents you believe address the allegation of a  
8 projected loss of \$30 million? And maybe that would pinpoint  
9 for the defendants exactly what you say has been provided and  
10 close this matter.

11 MR. BUTTERFIELD: I guess what I'm saying, your Honor,  
12 is that I think that this application is misguided because it's  
13 based on a meet-and-confer, on communication, 13 months ago, in  
14 which it was impossible for us, because we hadn't yet produced  
15 documents, to have any of those conversations. What Mr. Dowd  
16 should have done, if he wanted to identify all the different  
17 documents concerning damages, he should have served a  
18 contention interrogatory asking for that. We will undoubtedly  
19 identify all the different documents that we're relying on at  
20 the time that we produce our expert report.

21 THE COURT: I'm not understanding the position,  
22 because, in the first set of interrogatories, under the local  
23 rules of this Court, a party can ask for a calculation of  
24 damages, so you don't have to wait until the end of discovery  
25 when contention interrogatories can be served. That's one of

K5SKACTC

1 the first categories in the first set of interrogatories that  
2 can be addressed by the local rules. So, that's one thing.

3 The second thing is that, again, if the plaintiffs'  
4 position is, we have addressed the allegation about projected  
5 losses of \$30 million in some document or documents we have  
6 already submitted to the defendants, if that's the plaintiffs'  
7 position, tell me that now.

8 MR. BUTTERFIELD: Yes, that is our position, your  
9 Honor.

10 THE COURT: Okay.

11 Which document or documents, can you pinpoint them for  
12 the defendants, so that they can look at them and know, okay,  
13 here is where the plaintiffs are responding providing  
14 information about that \$30 million projected, it's in  
15 document X dated this document, it's in document Y dated that  
16 date? Can you do that for the defendants?

17 MR. BUTTERFIELD: If that is what you want to direct  
18 us to do, without us having been heard on all these other  
19 approximately 65 different categories, your Honor, which I  
20 think we should go back and do the proper meet-and-confer with  
21 the defendants to resolve this issue, but if you want us to  
22 just deal with this by identifying documents which confirm  
23 damages, we can do that.

24 THE COURT: No, not documents that concern damages.  
25 I'm focusing only on the allegation that was raised in document

K5SKACTC

1 163 about the \$30 million projection. You've already told me  
2 there's going to be a submission from an expert on all  
3 damages -- that's fine, that will come when it comes -- but I  
4 want to forestall having these numerous writings sent to me,  
5 seemingly daily, on matters that can be resolved rather  
6 quickly. There's a question about these projected losses,  
7 you've indicated you've already provided documents that address  
8 that, if it's identified for the defendant, these are the  
9 documents that speak to the \$30 million directives, that closes  
10 the door on that, we don't have to waste any more time on that.  
11 Certainly not my time.

12 I have made clear earlier that meeting and conferring  
13 is absolutely required before you bring matters to the Court.  
14 The matters now before me, I don't want to come back in a week  
15 or two and revisit the same matter. So let's close the door on  
16 it now, if we can. That's an efficient way to proceed and an  
17 economical way to proceed, and that's what Rule 1 of the  
18 Federal Rules of Civil Procedure suggest should be done, that  
19 the parties should have an efficient and economic litigation.

20 I want to move now to the item at docket entry  
21 No. 164, where there is a request by the defendants for 28  
22 email messages by Diana Tsutieva, because I'm seeing, without  
23 foundation, the defendants assert that these communications are  
24 not attorney-client communication because Ms. Tsutieva is the  
25 daughter of Defendant Rouslan Tsutiev, and that she once served

K5SKACTC

1 as general counsel to Actava TV. This issue of Ms. Tsutieva's  
2 stated as counsel to plaintiffs was addressed by me in the  
3 conference on May 5, 2020, and we can't continue to resurrect  
4 issues already resolved. That's not productive, it's not a  
5 good use of anyone's time. So, I'm not going to grant the  
6 request made by the defendants that's reflected in docket entry  
7 No. 164.

8 We'll come now to the matter that's docket entry  
9 No. 165. The last time we spoke, on May 5, 2020, the  
10 plaintiffs requested an opportunity to submit some legal  
11 authority to me on the issue that was discussed about exception  
12 to attorney-client privilege. That issue came up in connection  
13 with a number of communications that appeared or were  
14 identified on a privilege log, and matters on the privilege log  
15 were sent to me for in camera review, review was made. The  
16 writing at docket entry No. 165 isn't as narrowly tailored as I  
17 was led to believe would be coming to me, but, in any event,  
18 cases and arguments made by the plaintiffs in docket entry  
19 No. 165 do not persuade me that the common interest exception  
20 does not apply to the contested communications that were at  
21 issue when we spoke back on May 5, 2020. So the position that  
22 I took then with respect to those writings, and whether they're  
23 under the cover of the common interest exception, I maintain  
24 that position.

25 So those are the matters I wanted to raise with you.

K5SKACTC

1 I note that there is another outstanding writing from the  
2 parties. Unfortunately, my time was constrained all of last  
3 weekend on criminal matters, and I could not get to that  
4 document in time to address it during this conference. I would  
5 have preferred to do that, to be efficient, but it was not  
6 possible. So, I will be back to you when I have analyzed the  
7 writing -- I think it's docket entry No. 167 -- and alert you  
8 when I can have a conference with you to address that matter if  
9 a conference is needed.

10 Thank you very much. Good day.

11 COUNSEL: Your Honor, one more issue?

12 THE COURT: Yes.

13 MR. ROSENBERG: I'll defer to Toby Butterfield on  
14 this.

15 MR. BUTTERFIELD: No, go ahead, Mr. Rosenberg.

16 MR. ROSENBERG: Your Honor, I think the remaining  
17 issue is the authority of the channels to bring these  
18 applications.

19 Again, this is Michael Rosenberg, for the plaintiffs.

20 THE COURT: Oh, yes, I wanted to raise it, I'm sorry.  
21 I have a note to myself about the power of attorney that was  
22 discussed during the May 5 conference, and I was given to  
23 understand that Mr. Dowd would be making efforts to nail that  
24 down quickly because there was raised by the plaintiffs a  
25 question of whether there is continued representation by one of

K5SKACTC

1 the corporate defendants by Mr. Dowd, and, as I mentioned that  
2 on May 5, since a corporate entity cannot appear in an action  
3 pro se, it might be the Channel defendant might be in a default  
4 status if it's not represented by counsel.

5 Mr. Dowd, what is the latest on whether you have been  
6 authorized to continue to represent Channel through a power of  
7 attorney?

8 MR. DOWD: Your Honor, I received written assurances  
9 yesterday that the issue is being dealt with and that,  
10 hopefully, they're trying to speed up the process. They're  
11 dealing with COVID issues in Moscow. And I reiterate that I've  
12 been in communication, and I have authority from the client,  
13 it's just a question of having the power of attorney. So, we  
14 are making all efforts, and as soon as I have it, I will  
15 provide it, but in the meantime, I've got the authority.

16 MR. ROSENBERG: Your Honor --

17 THE COURT: Just a moment.

18 I have made clear what the vulnerability is that  
19 Channel has given this, I guess the word is, lapse in the power  
20 of attorney and the delay in getting a new power of attorney or  
21 a renewed power of attorney -- I don't know what the right  
22 phrase is -- but it places Channel in a very vulnerable  
23 position, and I don't know what action, if any, plaintiffs will  
24 take because of that, but I have made clear what the  
25 vulnerability is to Channel because of the lapse of power of



K5SKACTC

1 attorney.

2 Mr. Rosenberg, you wanted to be heard?

3 MR. ROSENBERG: Yes, your Honor. I just point out  
4 that we've been requesting this power of attorney for many  
5 months now, arguably before COVID took hold on a worldwide  
6 scale. The power of attorney has lapsed as of March 2020, and  
7 we would just request that your Honor set a date certain,  
8 perhaps June 5th, by which the defendants must submit a power  
9 of attorney or else the plaintiffs are permitted to submit an  
10 application to hold them in default.

11 MR. DOWD: May I be heard?

12 There's no precedent or authority for this type of  
13 application. I've never heard of it. I've made the  
14 representations to the Court that we have a retainer agreement,  
15 that we have ongoing communications with the client. I have  
16 never seen any case law where the lapse of a power of attorney  
17 had any effect on a lawyer's actual or apparent authority.

18 Notwithstanding that, as I said, I'm representing to  
19 the Court that I've conveyed faithfully the Court's thoughts on  
20 this, or its views, as your Honor expressed, faithfully to the  
21 client. The client has written to me that they're making  
22 efforts to get the paperwork resolved, and I hope to report  
23 soon, but I don't think any of this, in any way, could possibly  
24 be viewed to prejudice the plaintiff or the plaintiffs'  
25 actions. So the client is aware and is fully on notice.

K5SKACTC

1 THE COURT: Very well.

2 I am going to reject the request made by Mr. Rosenberg  
3 that I put a time certain on you and your client. You have the  
4 document power of attorney in place. I have, again, made clear  
5 the vulnerability that a corporate entity faces that is not  
6 represented by counsel in a litigation, and whatever  
7 application that any party wants to make with respect to that,  
8 any party can make, and I'm not inviting unnecessary motion  
9 practice. Again, I expressed to you today the desire that you  
10 have an economical litigation, an efficient litigation, but the  
11 vulnerability of the defendant entity has been expressed, and  
12 we proceed in that fashion.

13 Thank you very much. Good day.

14 COUNSEL: Thank you, your Honor.

15 \* \* \*